Supreme Court, U.S.
FILED
OCT 28 2008
OFFICE OF THE CLERK

No. 08-414

In The
Supreme Court of the United States

CENTURYTEL, INC.,

Petitioner,

v.

BARBRASUE BEATTIE and JAMES SOVIS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

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REPLY BRIEF FOR THE PETITIONER

Compelling reasons warrant review of the Sixth Circuit's decision. Despite Respondents' claims to the contrary, (BIO at 9), this case presents an issue of significant import to the national telecommunications sector – the proper basis for liability under an act regulating that industry. The Petition implicates issues attendant to the erroneous certification of a class in excess of 500,000 customers based on an errant reading of a federal statute, which interpretation eliminates the statutory elements to establish liability prior to a damages determination.

Section 206 of the federal Communications Act of 1934 ("Act"), 47 U.S.C. § 206, provides that a person who has been *injured by* a violation of the Act may thus prove liability, and thereafter prove damages. In a published decision, the Sixth Circuit held that "CenturyTel is liable if it violated § 201(b)" (Pet. App. at 24a) and thus disregarded in its Rule 23 analysis the import of two separate elements of a statutory claim under section 206: (1) injury to the claimant, (2) which was caused by a statutory violation. The Sixth Circuit did this by expressly merging the statutory *injury* and *causation* elements of the Act into its damages analysis, the result of which was the elimination of those prerequisites to liability.

The Sixth Circuit *conceded* that individual factual issues exist with respect to each and every class member, stating that although each "*will have to show that she did not enroll in WireWatch, ... that is relevant, ... to the issue of damages and not liability.*" (Pet. App. 24a. (emphasis added).) Respondents

likewise do not dispute the point that proof of each class member's enrollment is an individualized inquiry. But that individualized factual inquiry surrounding subscriber enrollment in WireWatch is relevant and necessary to prove *injury* – an express statutory element of liability. (*See* Pet. at 14-19.)

The presence of individualized liability issues bars class certification under applicable law. By mistakenly replacing the Act's required analysis of injury and causation with its discussion of damages (the individualized nature of which does not normally defeat certification), the Sixth Circuit *eliminated* those elements with respect to its typicality analysis under Rule 23(a) and its predominance analysis under Rule 23(b)(3). Thus, based on its incorrect interpretation of the elements necessary to establish liability, the Sixth Circuit's decision, affirming class certification, relieved each member of the certified class of 500,000 to 700,000 CenturyTel customers of their individual obligations to prove injury and causation as predicates to proving liability.

1. There Is No Basis For Respondents' Claim That Review Here Should Be Disallowed Because The Sixth Circuit Ruling Is Interlocutory

Respondents proclaim that this case does not "present a good opportunity" to address the elements of a claim under section 206 of the Act because certification decisions are "inherently interlocutory" (BIO at 9) and that Rule 23(f) appeals are not to be routine. (BIO at 11.)

CenturyTel petitions for certiorari pursuant to 28 U.S.C. § 1254(1). The Court's discretion to review cases in the courts of appeal is broad and virtually unlimited. *Forsyth v. City of Hammond*, 166 U.S. 506, 513 (1897) (the predecessor to section 1254(1) "expressed the thought of congress distinctly and clearly, and was intended to vest in this court a comprehensive and unlimited power"); *see also* 17 C. WRIGHT, A. MILLER, E. COOPER & V. AMAR, FEDERAL PRACTICE & PROCEDURE § 4036, at 8 (3d ed. 2008) ("The plenary nature of the power conferred by this provision [§ 1254(1)] is reflected in part by the general lack of technical restrictions on its exercise."). There is no bar to review of non-final judgments. *See Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997). This is precisely the case where this Court should intercede. Exercise of the power of review is appropriate where the lower courts have established an erroneous precedent as to elements of a claim pertaining to a federal statute regulating a national industry, resulting in the erroneous certification of a significant class.

Apart from review of interlocutory appeals under Rule 23(f), the courts of appeal have regularly reviewed interlocutory matters pursuant to 28 U.S.C. § 1292(b). The Court, in turn, has regularly reviewed those interlocutory decisions arising out of appeals taken pursuant to 28 U.S.C. § 1292(b). *See, e.g., Cutter v. Wilkinson*, 544 U.S. 709, 717-18 (2005) (reviewing the Sixth Circuit's reversal of the district court's denial of a motion to dismiss); *Norfolk Southern Ry. Co. v. Kirby*, 543 U.S. 14, 21-22 (2004) (reviewing the Eleventh Circuit's reversal of the district court's grant of summary judgment); *Jones v. R.R. Donnelley &*

Sons Co., 541 U.S. 369, 374-75 (2004) (reviewing the Seventh Circuit's reversal of the district court's denial of summary judgment).

In support of their position, Respondents cite *In re Delta Air Lines*, 310 F.3d 953 (6th Cir. 2002), *cert. den.*, 539 U.S. 904 (2003). (BIO at 11, 13.) But it was, in part, on the basis of *In re Delta Air Lines* that the Sixth Circuit granted CenturyTel permission to appeal in the first instance. (Pet. App. 31a-32a.) As the Sixth Circuit determined, the factors specified in *In re Delta Airlines* here warranted a Rule 23(f) interlocutory review:

> FED. R. CIV. P. 23(f) authorizes the courts of appeals to hear interlocutory appeals of class certification rulings . . . . However, the following factors support the acceptance of a Rule 23(f) interlocutory appeal:
>
> 1) if the class certification ruling is the death knell of the litigation; 2) if the appeal raises a novel or unsettled question; 3) if the petitioner has a likelihood of success on the merits of the appeal; and 4) if the posture of the case below supports an immediate appeal. *Id.*
>
> *Upon consideration of these factors, we conclude that interlocutory review of the class certification order in this case is warranted.*

Pet. App. at 31a-32a (citations omitted) (emphasis added).

Although review of interlocutory orders may be limited, such general bromides are not applicable here: *every* order as to which permission to appeal is sought and granted under Rule 23(f) is by definition interlocutory – as are appeals taken under 28 U.S.C. § 1292(b). Since the relatively recent promulgation of Rule 23(f) in 1998, appellate review of interlocutory orders granting or denying class-action certification was plainly authorized and permitted.[1] Rule 23(f) is, itself, a modification of the prior more limited philosophy of interlocutory review of class certification matters. *Cf., Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978) (certification is not a "final decision").

Rule 23(f) in no way limits this Court's authority and virtually unlimited discretion to review decisions of the courts of appeal by certiorari under 28 U.S.C. § 1254.[2]

Respondents claim that CenturyTel "fails to raise a serious question concerning generally applicable Rule 23 standards that might warrant review by this Court." (BIO at 12.) By equating a violation of the Act with liability, the Sixth Circuit omitted analysis of the distinct statutory requirements of injury and causation, and a review of the Sixth Circuit's opinion

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[1] Respondents' citation to and discussion of the "final judgment rule" (BIO at 10) is equally inconsequential inasmuch as Rule 23(f) explicitly permits interlocutory review.

[2] *See* FED. R. CIV. P. 23(f) advisory committee's note (1998) ("An order granting certification ... may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.").

reveals no analysis of these distinct requirements. Because of this omission, and because injury and causation (and thus liability) cannot be proven on a class-wide basis, the Sixth Circuit completely failed to apply properly the applicable Rule 23 standards of both typicality and predominance of common questions. (*See* Pet. at 20-24.)

Requiring CenturyTel to defend the claims of a certified class of 500,000 to 700,000 customers based on the incorrect statement of the elements of the underlying claim very well may dictate the ultimate disposition of this case. This undoubtedly implicates a serious question, since there must be a "rigorous analysis" to determine "that the prerequisites of Rule 23(a) have been satisfied." *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982). Further, the erroneous ruling below inescapably leads to a finding of liability as to all class members without regard to whether each – or any – class member can prove fundamental injury and causation or even standing. (*See* Pet. at 14-15, n.6.)

2. The Proper Enunciation Of The Elements Of A Claim Under Section 206 Of The Act Will Have A Broad Impact On The Telecommunications Industry And Is An Important Jurisprudential Standard

Respondents conclude that "a decision by this Court addressing the underlying facts likely would not have a material impact on current or future telecommunication industry billing practices." (BIO at 14.)

CenturyTel does not seek review of the "underlying facts." CenturyTel seeks review of the Sixth Circuit's interpretation of section 206 of the Act – an interpretation which plainly and improperly equated a statutory violation with liability – and ignored the distinct statutory requirements of injury and causation and its application in the context of this class action.

The decision below establishes a broad but erroneous jurisprudential standard. Section 206 applies to a host of potential violations of the Act, not simply billing practices. Section 206 applies to "any act, matter, or thing in this chapter prohibited or declared to be unlawful, or [where a carrier] shall omit to do any act, matter, or thing in this chapter[3] required to be done . . . ." 47 U.S.C. § 206. Indeed, the national breadth and jurisprudential significance of section 206 has been repeatedly demonstrated in dozens of cases. Such matters within the purview of section 206 include, by way of limited example:

- Failure to furnish communication service upon reasonable request in violation of section 201(a). *AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899, 903 (9th Cir. 2002).

- Improper use of "call information" and other "customer proprietary network information" in violation of section 222(c). *Weinstein v. AT & T Mobility LLC*, 553 F. Supp. 2d 637, 639 (W.D. Va. 2008).

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[3] Courts have interpreted section 206 to mean that a common carrier shall be liable for any violation of Title 47 United States Code sections 151-615b.

- Failure to establish reciprocal compensation arrangements for the transport and termination of telecommunications in violation of section 251(b)(5). *Fitch v. Pub. Util. Com'n of Tex.*, 261 Fed. Appx. 788, 793-94; No. 07-50088, 2008 WL 148940, at *4 (5th Cir. Jan. 16, 2008).

- Failure to interconnect with networks of competing local exchange carriers in violation of section 251(c)(2). *Core Commc'ns, Inc. v. Verizon PA, Inc.*, 493 F.3d 333, 335 (3d Cir. 2007).

- Discrimination in favor of or subsidization of its own payphone services in violation of section 276. *Davel Commc'ns, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1079 (9th Cir. 2006).

- Interference with a telephone equipment manufacturer's business in violation of sections 202(a) and 203(c). *In re Edwards Indus.*, 74 F.C.C. 2d 322, 328 (F.C.C. 1979).

- Failure to file tariffs and cost data for public access line services provided to customer in violation of section 276(a). *TON Servs., Inc. v. Qwest Corp.*, 493 F.3d 1225, 1242 (10th Cir. 2007).

The significance of a proper interpretation of section 206 extends well beyond the subject matter of this dispute and impacts the entire telecommunications industry.

3. The Sixth Circuit's Decision In Fact Conflicts With *Conboy*, And Respondents' Additional Arguments With Respect To That Conflict Are Unpersuasive

CenturyTel argued that the Sixth Circuit decision conflicts with the Second Circuit's decision in *Conboy v. AT&T*, 241 F.3d 242 (2d Cir. 2001). (Pet. at 25-29.) Respondents disagree. (BIO at 16.) With two points of minor rebuttal, CenturyTel reasserts its position that *Conboy* – which concluded that a mere violation of the Act will not result in liability without injury – cannot be reconciled with the Sixth Circuit's decision here that "CenturyTel is liable if it violated [the Act]." (Pet. at 24a.)[4]

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[4] First, Respondents attempt to distinguish *Conboy* on the basis that the "*Conboy* plaintiffs ... could not point to a separate line item in their telephone bills reflecting a charge from AT&T for its compliance with privacy requirements." (BIO at 17.) This is no distinction, since here the challenged charge similarly did not "reflect" CenturyTel's billing clarity requirement – it reflected a charge for the WireWatch service which CenturyTel in fact provided to subscribers. Further, this supposed distinction is irrelevant since here – as in *Conboy* – there is no evidence or allegation that Plaintiffs were paying for a billing description, whether the cost for the service was itemized or not.

Second, Respondents state that even if "petitioner's contentions concerning *Conboy's* interpretation of the ... Act were substantively correct, such a holding on the merits could not be 'in conflict' with a decision upholding a district court's exercise of discretion in certifying a class." (BIO at 15.) The district court's exercise of discretion in certifying a class is neither the point of CenturyTel's citation of *Conboy* nor the issue presented by CenturyTel's Petition. That issue is the proper enunciation of the elements of the underlying cause of action under section 206 of the Act.

In further attempting to distinguish *Conboy*, Respondents cite *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), a case the Sixth Circuit relied upon, contending that "[c]lass certification is a procedural matter and Rule 23 does not give a 'court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.'" (BIO at 16; *see* Pet. App. at 10a.)

Subsequent to *Eisen*, however, the Court has repeatedly recognized that "evaluation of many of the questions entering into determination of class action questions is intimately involved with the merits of the claims." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978). The class certification "determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Id.* at 469 (quoting *Mercantile Nat. Bank v. Langdeau*, 371 U.S. 555, 558 (1963)) (emphasis omitted). Indeed, "[t]he more complex determinations required in Rule 23(b)(3) class actions entail even greater entanglement with the merits . . . ." *Id.* at 469 n. 12.

The result in the instant case supports the appropriateness of the post-*Eisen* analysis and demonstrates the error in the Sixth Circuit's reliance on *Eisen*. Here, a class has been certified based upon an erroneous statement, and absence of analysis, of the elements of the underlying claim. Neither of the lower courts examined the "entanglement with the merits" as required by *Coopers & Lybrand*.

4. Statutory Interpretation Is Not A Matter Of Discretion, And Respondents Otherwise Do Not Successfully Defend The Sixth Circuit Ruling

Respondents leave for last their contention that the decision below is correct, claiming that the "Sixth Circuit correctly held that the district court acted within its discretion." (BIO at 18, heading.) But the correct interpretation of a statute (here, section 206) is not one that implicates an exercise of discretion. CenturyTel's argument is simple and straightforward: the Sixth Circuit failed as a matter of law to recognize that section 206 of the Act provides for a common carrier's liability only to a person who has been injured by the statutory violation. The class certification decision is erroneous because the injury and causation elements of liability under section 206 – when recognized and applied under Rule 23 – cannot be proven on a class-wide basis. (Pet. at 14-19.)

Respondents next contend that the insufficient bill description "deprived [each and every class member] of the opportunity" to object to those charges. (BIO at 19.) *This argument makes CenturyTel's individualized injury and causation argument exactly* – only those class members who can prove that they read their bills but did not understand the service for which they were being billed can prove such deprivation. *See* Pet. at 23 ("customers who did not read the 'services' portion of their bills (including the faulty billing description) were not *caused injury* by CenturyTel's billing description. Those customers were wholly unaware of what the billing description said . . . ."). Class

members who did not review their bills can establish neither those claimed deprivations nor liability.[5]

Respondents' various citations of authority simply do not address, much less answer, the presented question of the proper elements of a section 206 claim. Instead, Respondents press for a remand without review, which, as noted, will require CenturyTel, and potentially other entities subject to the Act, to defend a class action where individualized liability fact questions exist as to every class member.

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[5] Respondents in their Counterstatement of the Case reproduce an excerpt of the phone bill of named plaintiff Barbrasue Beattie, denoting (with emphasis) the "Non-Regulated Services" line item. (BIO at 4.) Respondents assert that only later, when the billing format was changed to reflect the charge as "Inside Wire Maint. Plan," were class members allowed to "recognize that the charge for 'Non-Regulated Services' was actually a charge for WireWatch." (BIO at 5.) Again, however, Respondents miss the point. As CenturyTel noted in its Petition, CenturyTel's WireWatch customers generally enrolled during telephone calls to arrange telephone service with CenturyTel, and CenturyTel's policy was not to enroll customers without their express consent. *See* Pet. at 4-5. Thus, Ms. Beattie's fact situation regarding her subscription to WireWatch is distinctive to her, proves nothing with respect to any other class member, and certainly sheds no light whatsoever on the issue presented: what are the elements of a claim under section 206?

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition for writ of certiorari, Petitioner CenturyTel, Inc. respectfully requests issuance of a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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Dated: October 28, 2008